FILE
JUN 21
HAROLD B. WILL

No. 152

In The

Supreme Court of the United States

October Term, 1953

City of Detroit, John H. Witherspoon, Controller, and James A. Hoye, Deputy Commissioner and Director of Traffic of the Police Department of said City of Detroit,
Plaintiffs-Appellees,

v.

Ira W. Jayne, Chester P. O'Hara, et al, Judges of the Circuit Court for Wayne County, Michigan,
Defendants,

Service Parking Grounds, Civic Center Garage, Inc., Madison Parking Co., Parking Realty Company, Parking Investment Corporation, Park Place Corporation, Theatre Parking, Inc., Union Parking Company, Incorporated (all Michigan corporations), Joseph Fee and Beulah Fee, co-partners as Willis Parking Co., Hyman Miller and Tillie Miller, copartners as Jefferson Parking, Sidney Pozen, d/b/a Sidmar Parking Co., George Salloum, d/b/a Fox Parking Co., George Rashid, d/b/a Bagley Parking Co., Samuel C. Binkow, M. Bertha Binkow, Joseph Katchke copartners as Briggs Parking, and Lottie Feldman,
Defendants-Appellants.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS APPEAL OR TO AFFIRM

GEORGE E. BRAND,
GEORGE E. BRAND, Jr.,
Attorneys for Appellants.

MOERS, INC., 905 HENRY ST., DETROIT, MICH.

SUBJECT INDEX

Page

Statement as to and grounds of appellees' motion to dismiss appeal or affirm 1

APPELLANTS' CONTENTIONS AND ARGUMENT

Appeal - Certiorari

Appeal, not certiorari is appellants' remedy to review the federal question as to the constitutionality of the statutes and ordinances. The prohibition order can be justified only on the theory that the statutes and ordinances were not repugnant to the 14th Amendment. 2-4

Lack of Federal Question

Appellees base their contention that no substantial federal question was or is involved upon the sole ground that appellants had no litigable interest, because of prior Michigan decisions in litigation by other parties, and that this involved only a question of local law. 4-5

Appellees' petition for prohibition sought no determination on the *merits* of the controversy presented by appellants' bill of complaint nor a trial of determinative issues of fact. They sought only to bar appellants from litigating any issues in any court, including, presently, the Supreme Court of the United States. 4-5

Appellees, through prohibition procedure, sought to bar appellants from a judicial determination of the constitutionality of the statutes and ordinances, a federal question as to which the Supreme Court of Michigan lacks the power of final determination. 5-6

Appellees contend that unless a tax or a tax liability is involved an operator of a private business cannot question competition by a municipality. The error therein is that the only permissible municipal competition is that which is lawful, and to hold that a private business operator, who claims municipal

Page

competition is unlawful because the statute and ordinances which make the competition possible and effective are repugnant to the federal constitution, can be barred from presenting his claim to a court for decision, is tantamount to saying that the interpretation and enforcement of a federal constitutional right is a local question finally determinable in the state court. 6-7

The Supreme Court of Michigan, inevitably passed upon the federal questions. Appellees' contentions that the decision of that court is sustainable on a local non-federal question is obviously erroneous. The matter of a litigants' qualification and right to raise a federal constitutional question is itself a federal question. 7

The Supreme Court of the United States has the right of final determination of the federal questions. 7-8

Appellees do not deny that appellants were denied a determination of the right to litigate the claim that the city's off-street garages could not legally be exempted from taxation; nor do they offer support for such denial. The question as to tax exexemption has never been judicially determined. 9

Without permitting any hearing as to the facts bearing on the validity of the statutes and ordinances, the Michigan court gave appellees declaratory relief contrary to appellants' constitutional rights. 9

Prohibition - Procedure

Appellants' bill of complaint presented an equitable controversy of a type, as to subject-matter and parties and as to injunctive and declarative relief sought, unquestionably within the constitutional jurisdiction of the circuit court. But the Supreme Court of Michigan had no original equitable jurisdiction, and in such a matter its jurisdiction was solely appellate. 10

Page

The test as to the jurisdiction of the circuit court is whether a controversy is within the general class of controversies over which that court has jurisdiction; not whether a plaintiff has the right to relief in a particular case. 11

Prohibition against a judicial tribunal lies only against the exercise of non-existent jurisdiction or an excess of jurisdiction. 11-14

The sole ground upon which appellees alleged that the Supreme Court of Michigan had jurisdiction to order prohibition was that the circuit court was wholly without jurisdiction—for the reason that appellants (plaintiffs in that court) were not proper parties, having no litigable interest. 14

The petition for prohibition disclosed no basis of original Supreme Court jurisidiction, and what appellees alleged as the sole reason for lack of circuit court jurisdiction presented no question of *jurisdiction*, but only of *merits*, presentable to the Supreme Court of Michigan only on appeal. 14-15

Appellants' litigable status could not be determined adversely without deciding against the constitutional rights which they claimed. 15

The interpretation of prior decisions and their application to factual situations developed by evidence is recognized trial court function to which appellants were entitled under the equal protection and due process of laws provisions of the federal constitution. The Supreme Court of Michigan lacked jurisdiction to displace the circuit court. 16

Prior Michigan Cases

Analysis of the six cases upon which the Michigan court predicated its judgment and upon which the appellees rely. 17-19

There was no basis for applying the principles of res judicata or of collateral estoppel, because appellants were not parties to any of the prior cases, and no bar to exercise of the power of the Supreme

Page

Court of the United States to review a state court judgment denying a federal right can be predicated upon a state court adjudication thereof. 19-20

The facts and issues in the six prior cases differed materially from those in appellants' case; the prior cases did not and could not determine the important questions raised by appellants; none of the cases determined that there was a jurisdictional impediment to the exercise of circuit court jurisdiction nor a basis for investing the Supreme Court of Michigan with plenary prohibition powers, and no settled pattern of Michigan decisions as to the issues presented by appellants has emerged therefrom. 21

No case in which a trial of the issues presented by appellants has been decided by a Michigan trial court; in no other case has a litigant asserting like or similar rights or claims been denied the right to a trial thereof; there has been no review of any of the prior cases by the United States Supreme Court nor has it decided any of the questions raised by appellants as to the constitutionality of the statutes or ordinances. 21-22

Appellees misconcieve the principle and essence of the equal protection and due process of law provisions of the federal constitution. The requirement of equal protection of laws inhibits discriminatingly barring a litigant from access to the court 22

Viewed from any angle the statute and ordinances were upheld against claimed repugnancy to the federal constitution and by a procedure that denied appellants equal protection and due process of law guaranteed by that constitution. 22

Table of Cases

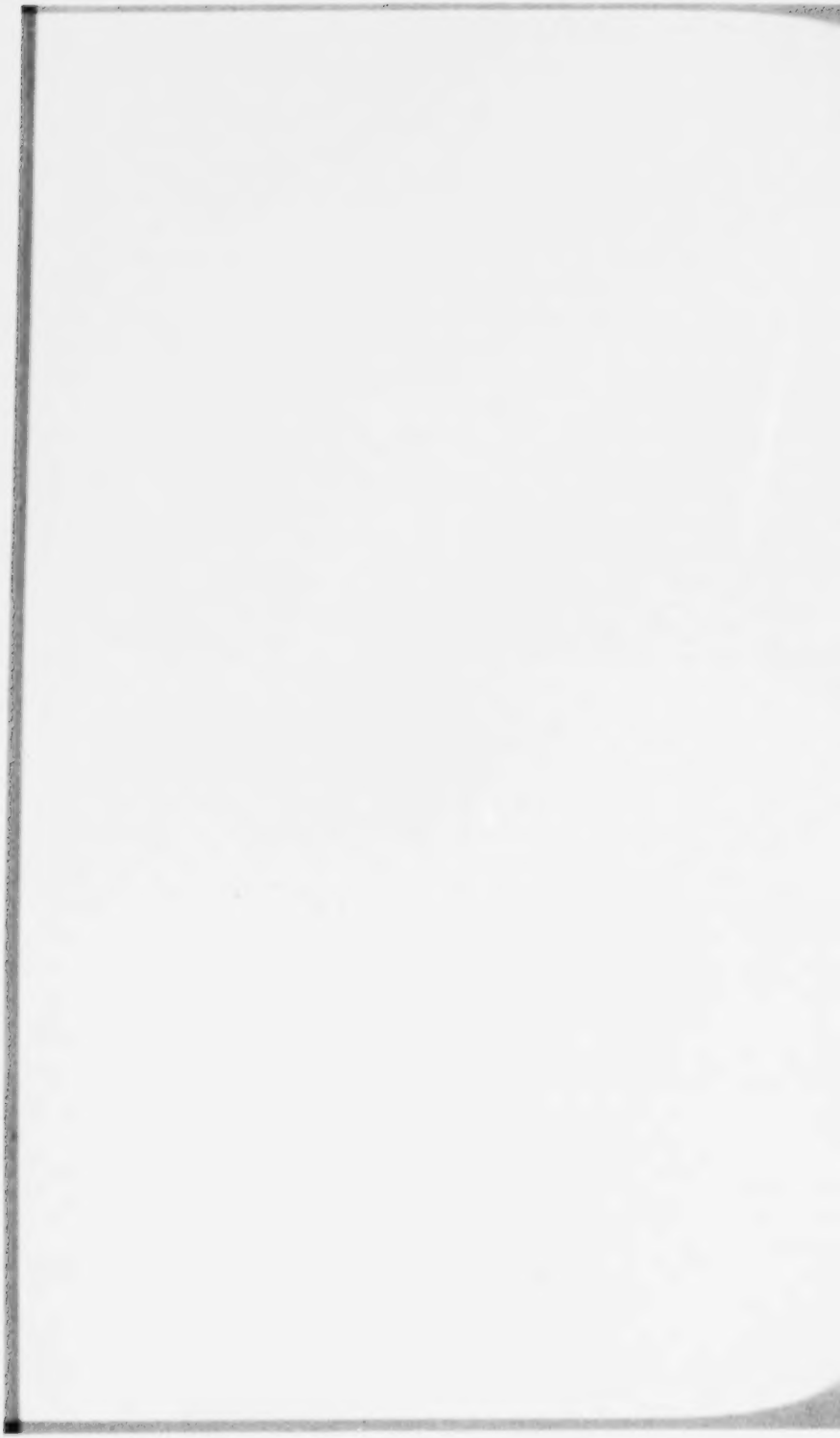
	Page
Andrews v. City of South Haven (1915), 187 Mich. 294	17
Angel v. Bullington, 330 US 183, 189, 67 S Ct 657, 91 L ed 832, 836	7, 15
Bailey v. DeGraff, 2 Doug. 169	10
Bank of Michigan v. Niles, Walk. 398	10
Bankers Life and Casualty Company v. Holland, — US —, 98 L ed (Advance p. 85)	11
Bowers v. City of Muskegon (1943), 305 Mich. 676	17
Breard v. City of Alexandria, 341 US 622, 71 S Ct 920, 95 L ed 1233	3
Brinkeroff-Faris Trust & Savings Co. v. Hill, 281 US 673, 50 S Ct 451, 74 L ed 1107	9
Broderick v. Rosner, 294 US 629, 55 S Ct 589, 79 L ed 1100	20
Brown v. Board of Education of Topeka, — US —, 98 L ed (Advance p. 583)	3
Bullock v. Florida ex rel. Railroad Comm., 254 US 513, 41 S Ct 193, 65 L ed 380	2
Cleveland v. City of Detroit (1949), 324 Mich. 527	17
Crew Levick Company v. Commonwealth of Pennsylvania, 245 US 292, 38 S Ct 126, 62 L ed 295	8
Feiner v. State of New York, 340 US 315, 71 S Ct 303, 95 L ed 295	8
General Investment Company v. New York Central R Co., 271 US 228, 46 S Ct 496, 70 L ed 920	15
Grand Rapids, G.H. & M.R. Co. v. Stevens, 143 Mich. 646	10
Jay v. Two-Bit Corporation, 287 Mich. 244, 253	11
Illinois v. Board of Education, 333 US 203, 68 S Ct 461, 92 L ed 649	3
Jamison v. Texas, 318 US 413, 62 S Ct 669, 87 L ed 869	3
King Mfg. Co. v. Augusta, 277 US 100, 48 S Ct 489, 72 L ed 801	3
Kovacs v. Cooper, 336 US 77, 69 S Ct 448, 93 L ed 513	3

	Page
Menendez v. City of Detroit (1953), 337 Mich. 476	17
Moscow Fire Insurance Co. v. Bank of New York & Trust Co., et al, 3 NYS 2d 653, affirmed 284 NY 555	19
Municipal Investors Ass'n v. City of Birmingham, 316 US 153, 62 S Ct 975, 86 L ed 1341	3
Nichols v. State Administrative Board (1954), 338 Mich. 617	17
Niemotko v. State of Maryland, 340 US 268, 71 S Ct 325, 95 L ed 267	8
Partmar Corporation v. Paramount Pictures Theatres Corporation, — US —, 98 L ed (Advance p. 1)	19
Poulos v. New Hampshire, 345 US 395, 73 S Ct 760, 97 L ed 1105	3
Rogers v. Wayne Circuit Judge (1928), 243 Mich. 703, 705	12
Saunders v. Shaw, 244 US 317, 37 S Ct 638, 61 L ed 1163	9
Second National Bank & Trust Co. v. Wayne Circuit Judge (1948), 321 Mich. 28, 45-46	12
State Bar of Michigan v. Ingham Circuit Judge (1943), 307 Mich. 393	13
Stephenson v. Golden, 279 Mich. 710, 732	10
Storaasli v. State of Minnesota, 283 US 57, 51 S Ct 354, 75 L ed 839	8
Thomas v. Hamilton, 101 Mich. 387	11
Toebe v. City of Munising, 282 Mich. 1	17
Traverse City K. & G.R. Co. v. Seymour, 81 Mich. 378	10
United States v. Pink, 315 US 203, 62 S Ct 552, 86 L ed 796	8, 19
Wayne Village President v. Wayne Village Clerk (1949), 323 Mich. 592	18
Western Turf Association v. Greenberg, 204 US 359, 27 S Ct 384, 51 L ed 520	3
Winters v. People of State of New York, 333 US 507, 68 S Ct 665, 92 L ed 840	3, 8
Young v. Ragen, 337 US 235, 69 S Ct 1073, 93 L ed 1333	20

BLEED THROUGH POOR COPY

Text

	Page
United States Code:	
28 § 1257(2)	3
Constitution of Michigan:	
Art. VII, § 4	10
Art. VII, § 10	10
Michigan Compiled Laws 1948:	
§ 606.4	10
§ 601.9	10
Michigan Statutes Annotated:	
§ 27.545	10
§ 27.29	10



BLEED THROUGH POOR COPY

In The

Supreme Court of the United States

October Term, 1953

No.

City of Detroit, John H. Witherspoon, Controller, and James A. Hoye, Deputy Commissioner and Director of Traffic of the Police Department of said City of Detroit,
Plaintiffs-Appellees,

v.

Ira W. Jayne, Chester P. O'Hara, et al, Judges of the Circuit Court for Wayne County, Michigan,
Defendants,

Service Parking Grounds, Civic Center Garage, Inc., Madison Parking Co., Parking Realty Company, Parking Investment Corporation, Park Place Corporation, Theatre Parking, Inc., Union Parking Company, Incorporated (all Michigan corporations), Joseph Fee and Beulah Fee, co-partners as Willis Parking Co., Hyman Miller and Tillie Miller, copartners as Jefferson Parking, Sidney Pozen, d/b/a Sidmar Parking Co., George Salloum, d/b/a Fox Parking Co., George Rashid, d/b/a Bagley Parking Co., Samuel C. Binkow, M. Bertha Binkow, Joseph Katchke copartners as Briggs Parking, and Lottie Feldman,
Defendants-Appellants.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS APPEAL OR TO AFFIRM

Appellees have moved to dismiss appeal from, or to affirm, a judgment entered in an original proceeding in the Michigan Supreme Court, prohibiting appellants, the owners and operators of off-street automobile parking facilities, from prosecuting their circuit court chancery suit against appellees, a municipality and its officers, in which suit appellants claim that the municipality is unlawfully competing with them perforce provisions of state

statutes and municipal ordinances alleged to be in excess of the legitimate police power and repugnant to the Fourteenth Amendment. In their statement opposing jurisdiction appellees do not, and cannot, controvert or impugn appellants' jurisdictional statement showing that the essence of appellants' bill of complaint and of their responses in the prohibition proceedings was the claimed invalidity of the statutes and ordinances on the ground of repugnancy thereof to the federal constitution. Uncontrovertibly, a primary and basic federal question as to the constitutionality of the statutes and ordinances was instilled at the outset and was persistently maintained. Decision was in favor of validity.

Grounds of Appellees' Motion

The stated grounds of appellees' motion to dismiss the appeal or to affirm are the four they list under the heading "Issues."

Appeal - Certiorari

The first ground is that certiorari, not appeal, is the remedy. Facts and court decisions referred to in appellants' jurisdictional statement establish the contrary. The *Bullock case*, upon which appellees rely, did not involve any attack on the constitutionality of a state statute, but an entirely different kind of federal question.[1]

Appeal not only appears to be the proper remedy to review the federal question herein as to the constitutionality of the statutes and ordinances, but also the other constitutional questions which developed by reason of the prohibition proceedings. In fact, the prohibition order, which

[1] *Bullock v. Florida ex rel. Railroad Comm.*, 254 US 513, 41 S Ct 193, 65 L ed 380, involved the validity of a provision of a trial court foreclosure decree. Prohibition by the state supreme court was in the nature of an appeal therefrom. Certiorari was granted by the Supreme Court of the United States.

appellees admit this court has certiorari jurisdiction to review, can be justified only on the theory that the statutes and ordinances attacked in both the circuit and supreme courts are not repugnant to the Fourteenth Amendment. The validity of the revenue bond act and the city ordinances having been drawn into question on the ground of claimed repugnancy thereof to the Fourteenth Amendment, and upheld by the Michigan court, the Supreme Court of the United States has jurisdiction on appeal under 28 USC § 1257(2):

> *Western Turf Association v. Greenberg*, 204 US 359, 27 S Ct. 384, 51 L ed 520, that a state court judgment sustaining the validity of a state statute as a valid exercise of police power, against a claim of repugnancy to the Fourteenth Amendment, is reviewable on writ of error.
>
> *Municipal Investors Ass'n v. City of Birmingham*, 316 US 153, 62 S Ct 975, 86 L ed 1341.
>
> *Winters v. People of State of New York*, 333 US 507, 68 S Ct 665, 92 L ed 840.
>
> *Illinois v. Board of Education*, 333 US 203, 68 S Ct 461, 92 L ed 649, motion to dismiss appeal denied.
>
> *Kovacs v. Cooper*, 336 US 77, 69 S Ct 448, 93 L ed 513.
>
> *Breard v. City of Alexandria*, 341 US 622, 71 S Ct 920, 95 L ed 1233.
>
> *Poulos v. New Hampshire*, 345 US 395, 73 S Ct 760, 97 L ed 1105:
>
> > "This analysis showing an attack on the ordinance as applied as repugnant to the principles of the First Amendment and a determination of its validity by the New Hampshire Supreme Court requires us to take jurisdiction by appeal."[2]
>
> *Brown v. Board of Education of Topeka*, — US —, 98 L ed (Advance p. 583).

---

[2] Citing *King Mfg. Co. v. Augusta*, 277 US 100, 48 S Ct 489, 72 L ed 801 and *Jamison v. Texas*, 318 US 413, 62 S Ct 669, 87 L ed 869.

The second ground of appellees' motion pertains to the constitutionality of the prohibition proceedings. Discussion thereof is deferred to pages 10-22, post.

Lack of Federal Question

The third and fourth grounds of appellees' motion are:

> "(3) No decision of a federal question was involved, necessary or controlling in the determination of the cause by the Supreme Court of Michigan.
>
> "(4) The appellants were not deprived of due process of law or equal protection under the Federal Constitution by the ordinances or laws, the validity of which was challenged in the circuit court proceeding."

It is on *these* grounds only that appellees conclude that "appellants have failed to raise a substantial federal question" and, as will presently be pointed out, ground (4) is restricted by appellees' argument thereof.

Analysis of these grounds makes it clear just what was the limited basis and the broad objective of the extraordinary prohibition proceeding, and precisely what appellees' motion seeks to have the Supreme Court of the United States do. That can be brought into bold relief by first referring, briefly, to the relief sought by appellees in the prohibition proceedings.

Appellees' petition for prohibition shows clearly that appellees were not endeavoring to obtain from the Supreme Court of Michigan a determination on the *merits* of the controversy which would be dependent upon the factual situation presented to the circuit court by the bill of complaint, nor to have any court trial of such issues, but that

appellees were seeking to bar appellants from litigating any issues in any court (including, presently, the Supreme Court of the United States) on the sole ground that appellants had no litigable interest because, in other cases among other parties, the Supreme Court of Michigan had held that: (a) a mere taxpayer could not attack a revenue bond financing, (b) an operator of a private business had no right of immunity from [any] competition by a municipality and (c), such questions had been sufficiently litigated to justify a halt of further controversy thereover. (See petition, paragraphs 10-11, R. 11-13). Although the petition *as to facts*, was implemented by various affidavits (R. 17-20, 148-151) and newspaper clippings (R. 153-192) and by extensive answer to appellants' responses (R. 232-246), appellees denied that the trial of any issue of fact was required, and alleged that final decision could and should be made on the [adjudicated] law (R. 234-235); a contention which appellants controverted throughout (R. 199-200, 265-266).

What the appellees were seeking through the prohibition procedure was to deprive the appellants of their day in court and to bar them from seeking or obtaining a judicial determination of their claim that the revenue bond financing statutes and ordinances violated appellants' rights under the constitution of the United States—a federal question and a federal right as to which the Supreme Court of Michigan lacks the power of final determination.

The two grounds of appellees' motion, amplified by their argument thereof, clearly disclose the erroneous rationalization which, thus far, has produced the result which appellees set out to accomplish, and which their motion seeks to perpetuate.

In substance, the contentions of appellees in their motion are that:

(a) *Final determination has been made in prior* cases among other parties that unless a tax or tax liability is involved, a taxpayer cannot question the validity of municipal revenue bond financing, and, in no event has an operator of a private business any immunity against municipal competition; and that the determination of these matters, in each instance, is solely of local law and does not involve any federal question.

(b) The Supreme Court of Michigan *did not decide any federal question* by its decision that the lower court had no jurisdiction, and that appellants had no right, in the Supreme Court prohibition proceeding, to litigate the questions which appellants presented.

(c) If, however, the Supreme Court of Michigan did decide a federal question, it was neither necessary nor controlling, because the question of appellants' litigable status was one of local law and was adequately dispositive.

The fundamental error in appellees' contention is that the only permissible municipal competition with private business is that which is lawful in character. To hold that the operator of a private business, who claims that a municipal competition is unlawful because the statute and ordinances which make such competition possible and effective are repugnant to the federal constitution, can be barred from presenting his claim to a court for decision, is tantamount to saying that the interpretation and enforcement of federal constitutional rights is a local question, finally determinable in the state court.

Appellees remove any doubt as to the erroneous theory upon which they induced the Supreme Court of Michigan to grant prohibition, i. e., that by reason of previous decisions by the Michigan court appellants had no standing either in the circuit court or in the prohibition proceedings to secure a determination of their federal constitutional rights.

POOR COPY

In determining that appellants should be prohibited from proceeding in the circuit court, and that appellants had no right in the prohibition proceeding to a trial of the issues of fact or on the merits (but that appellees should have declaratory relief) the Supreme Court of Michigan, inevitably, passed upon the federal questions. Appeal would lie if the Supreme Court of Michigan, as an appellate court, had entered the same judgment upon appeal from a judgment of the circuit court or, in an original proceeding, had entered such judgment after a full trial in the Supreme Court.

Appellees' contention that the decision of the Supreme Court of Michigan is sustainable on a local, non-federal question, is predicated upon the obviously erroneous concept that the qualification and right of a litigant to raise a federal constitutional question is merely a question under local law. On the contrary, the matter of such qualification and rights presents, per se and perforce, a federal question, whether the judgment denying such qualification and right is predicated upon former decisions or upon decision anew.

Angel v. Bullington, 330 US 183, 189, 67 S Ct 657, 91 L ed 832, 836 (italics added):

> "But whether the claims are based on a federal right or are merely of local concern is itself a federal question on which this Court, and not the Supreme Court of North Carolina, has the last say. *That Court could not put a federal claim aside as though it were not in litigation, by the talismanic word 'jurisdiction.'* When an asserted federal right is denied; the sufficiency of the grounds of denial is for this Court to decide. * * * Bullington could have come here, nor merely by the grace of this Court on certiorari, but on appeal * * *."

We have no disagreement with appellees' contention that, to be reviewable in the Supreme Court of the United States, a federal question must have been presented and

actually decided, or that the judgment could not have been rendered without deciding such question. Such requirements were met in the instant case. What appellants do disagree with, however, is appellees' contention that the decision and order of the Supreme Court of Michigan are sustainable solely on matters of local law, independently of the federal constitutional question. The federal right asserted by appellants has its source in, and receives its vitality from, the federal constitution, not local enactment. Appellees' error is self-evident. The prohibition proceeding was planted and conducted on the erroneous basis, and the contention completely ignores the fact that not only was decision of the federal question essential to the prohibition judgment, but the Supreme Court of the United States, not the Supreme Court of Michigan, has the right of its final determination.

Crew Levick Company v. Commonwealth of Pennsylvania, 245 US 292, 38 S Ct 126, 62 L ed 295:

> "As in other cases of this character, we accept the decision of the state court of last resort respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts." (Citing cases)

Accord:

Storaasli v. State of Minnesota, 283 US 57, 51 S Ct 354, 75 L ed 839.

United States v. Pink, 315 US 203, 62 S Ct 552, 86 L ed 796, page 19, post.

Winters v. People of State of New York, 333 US 507, 68 S Ct 665, 92 L ed 840.

Feiner v. State of New York, 340 US 315, 71 St Ct 303, 95 L ed 295.

Niemotko v. State of Maryland, 340 US 268, 71 S Ct 325, 95 L ed 267.

Appellees make no attempt to contradict the allegation of appellants' jurisdictional statement in respect of the refusal of the Supreme Court of Michigan to pass upon, or to permit appellants to litigate, the question of tax exemption of city off-street automobile parking facilities and the unlawful competition resulting from open disregard of the statutory mandate that such facilities be taxed. They make no claim that the tax question has ever been determined and offer no support for the Court's refusal. Moreover, and without according a hearing of the important facts involving the application of the two ordinances and the impact thereof upon the appellants, the Michigan court gave *appellees* declaratory relief vitally affecting appellants and contrary to their federal constitutional rights.

Appellants' application for rehearing (R. 257-258, 266-267) asserted the additional federal questions as to due process and equal protection of law arising from the unusual disposition of case; thus augmenting the appellate jurisidiction of the Supreme Court of the United States in the matter.

Saunders v. Shaw, 244 US 317, 37 S Ct 638, 61 L ed 1163, holding that an appellate court judgment which affirmed a ruling of the lower court that appellant had no right to present evidence on a certain issue, could be reviewed on writ of error as a claimed denial of due process of law.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 US 673, 50 S Ct 451, 74 L ed 1107.

Prohibition - Procedure

The second ground of appellees' motion is that the prohibition judgment did not deprive appellants of federal constitutional rights of due process and equal protection of law. On page 16, post, we deal with appellee' explanation and argument of this ground.

The bill of complaint presented an equitable controversy of a type that, as to subject-matter and parties and as to injunctive and declarative relief thereby sought, was unquestionably within the jurisdiction of the Circuit Court for Wayne County Michigan, in Chancery.[3] The controversy set forth therein was an actual one, and the matters complained of vitally affected appellants, their rights, business and properties. The controversy presented by the bill of complaint was of a class traditionally within circuit jurisdiction, i. e., bill to enjoin enforcement of city ordinances claimed to be in excess of police and other power of a municipality, and the resultant unfair business competition with the plaintiffs; also to obtain relevant declaration of rights involved.

On the other hand, the Supreme Court of Michigan had no original equitable jurisdiction, either under the Michigan Constitution or statute.[4] Its jurisdiction in such a matter was solely appellate.

Stephenson v. Golden, 279 Mich. 710, 732.

Grand Rapids, G.H. & M.R. Co. v. Stevens, 143 Mich. 646.

Traverse City K. & G. R. Co. v. Seymour, 81 Mich. 378.

Bank of Michigan v. Niles, Walk. 398.

Bailey v. DeGraff, 2 Doug. 169.

---

[3] Art. VII, § 10 Constitution of Michigan; § 606.4 Michigan Compiled Laws 1948, § 27.545 Michigan Statutes Annotated.

[4] Art. VII, § 4 Constitution of Michigan; § 601.9 Michigan Compiled Laws 1948; § 27.29 Michigan Statutes Annotated.

The test as to circuit court subject-matter jurisdiction is whether a controversy is within the general class of controversies over which that court has jurisdiction; not whether a plaintiff has a right to relief in a particular case. This is settled in Michigan.

Jay v. Two-Bit Corporation, 287 Mich. 244, 253.[5]

Prohibition against a judicial tribunal does not lie except against the exercise of *non-existent* jurisdiction or an *excess* of jurisdiction.'[6]

This is a well recognized principle of both state and federal jurisprudence.

Bankers Life and Casualty Company v. Holland, — US —, 98 L ed (Advance p. 85) involving a writ of mandamus:

> "The All Writs Act grants to the federal courts the power to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 USC § 1651(a). As was pointed out in *Roche v. Evaporated Milk Asso.* 319 US 21, 26, 87 L ed 1185, 1190, 63 S Ct 938 (1943), the 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' * * *
>
> "It is urged, however, that the use of the writ of mandamus is appropriate here 'to prevent judicial inconvenience and hardship' occasioned by appeal being delayed until after final judgment. But it is established that the extraordinary writs cannot be used as a substitute for appeal, *Ex parte Fahey*, 332 US 258,

[5] Appellees in the instant case, without special appearance, actually invoked the jurisdiction of the circuit court by moving therein to dismiss appellants' bill of complaint on non-jurisdictional and claimed jurisdictional grounds.

[6] The mandamus sought by appellees herein was only incidental to prohibition and was to require the circuit court to dismiss appellants' bill of complaint. Mandamus does not lie against private individuals. *Thomas v. Hamilton*, 101 Mich. 387.

260, 91 L ed 2041-2043, 67 S Ct 1558 (1947), even though hardship may result from delay and perhaps unnecessary trial, *United States Alkali Export Asso. v. United States*, 325 US 196, 202, 203, 89 L ed 1554, 1560, 1561, 65 S Ct 1120 (1945); *Roche v. Evaporated Milk Asso. supra* (319 US at 31); and whatever may be done without the writ may not be done with it. *Ex parte Rowland*, 104 US 604, 617, 26 L ed 861, 866 (1882). * * *

"We adhere to the language of this Court in *Ex parte Fahey, supra* (322 US at 259, 260):

" 'Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy . . . . As extraordinary causes.' "

Second National Bank & Trust Co. v. Wayne Circuit Judge (1948), 321 Mich. 28, 45-46:

"The generally accepted rule is that the writ of prohibition is the appropriate remedy only where the court is acting entirely without jurisdiction or in clear excess of its jurisdiction."

Rogers v. Wayne Circuit Judge (1928), 243 Mich. 703, 705. Prohibition sought in the Supreme Court to enjoin circuit court injunction suits. In denying prohibition the Supreme Court said (italicts added):

"Upon a motion to dismiss filed in the court below, this question may be there decided, and, upon appeal to this court from such decision, we may finally dispose of it. *Manifestly, that court has the power, the jurisdiction, to decide the question.* The cases there pending are injunction cases pure and simple, they belong to the class of cases that court has jurisdiction to hear and dispose of. The writ of prohibition is an extraordinary writ and should not and will not be granted where the petitioner has an adequate remedy

by some other proceedings. In *People v. Wayne Circuit Court*, 11 Mich. 393 (83 Am. Dec. 754), it was held (quoting from the syllabus):

'The writ of prohibition can not be issued to restrain any action of inferior courts which can be reviewed by any of the ordinary methods.'

"And in *Hudson v. Judge of Superior Court*, 42 Mich. 239, it was held (likewise quoting from the syllabus):

'A writ of prohibition is a common-law preventive against the encroachment, excess or improper assumption of jurisdiction, and can only be resorted to in clear cases and where other remedies are ineffectual. It may lie at the suit of one or more parties on either side to restrain the action of the court so far as it exceeds its jurisdiction and thereby affects the petitioner; but it is a discretionary writ and will not be granted unless it appears that the petitioner has vainly applied for relief to the court against which he wishes it to issue.'

"These cases have been constantly followed by later decisions of this court;" (citing cases).

State Bar of Michigan v. Ingham Circuit Judge (1943), 307 Mich. 393.[7] Writ granted to prohibit a chancery court from enjoining a state bar grievance committee (appointed by rule of court) from processing a disbarment complain. Said the court:

"In *Nichols v. Judge of Superior Court of Grand Rapids*, 130 Mich. 187, we said:

'The writ of prohibition is the appropriate remedy only where the court is acting entirely without jurisdiction or in clear excess of its jurisdiction. It is not applicable where the party has a complete and adequate remedy in some other and more ordinary form. * * * The principle is thus stated:

---

[7] This is the case which gave rise to *Emmons v. Smith*, 149 F. 2d 869, quoted by appellees on their motion herein.

> 'The broad governing principle is that a prohibition lies where a subordinate tribunal has no jurisdiction at all to deal with the cause or matter before it, or where, in the progress of a cause within its jurisdiction, some point arises for decision which the inferior court is incompetent to determine. But a prohibition will not lie where the inferior court has jurisdiction to deal with the cause and with all matters necessarily arising therein, however erroneous its decision may be upon any point.'' *Heard, Shortt, Extraordinary Remedies*, p. 436.'
>
> ''The lack of jurisdiction in the chancery court clearly appeared from the bill of complaint."

In their responses appellants challenged the prohibition jurisdiction of the Supreme Court of Michigan which appellees' original petition therein invoked. It is important to consider just what the appellees alleged as the underlying basis of such jurisdiction. But one ground was alleged, the core of which is

> ''that the Circuit Court for the County of Wayne *is wholly without jurisdiction to consider and determine the litigation below for the reason that the plaintiffs are not proper parties*, having no litigable interest in the matter either as residents, taxpayers or so-called competitors'' and that *''such lack of any proper party plaintiff results in the lack of jurisdiction of said Circuit Court.''* (R. 11-13, italics added)

This allegation was implemented by statements as to why the exercise of prohibition jurisdiction was justified, i. e., avoidance of delay of usual procedure, need and public importance of the proposed city parking facilities and alleged nuisance character of the circuit court litigation, claimed to be evidenced by 40 critical newspaper clippings.

The petition for prohibition, on its face, disclosed no valid basis of original supreme court jurisdiction, and what appellees alleged as the sole reason for lack of circuit court jurisdiction presented no question of *jurisdiction* but only of *merits*, i. e., appellants' litigable status.

BLEED THROUGH POOR COPY

General Investment Company v. New York Central R. Co., 271 US 228, 46 S Ct 496, 70 L ed 920, (italics added):

> "* * * By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits * * * as where the plaintiff seeks preventive relief against a threatened violation of law of which he has no right to complain, *either because it will not injure him or because the right to invoke such relief is lodged exclusively in an agency charged with the duty of representing the public in the matter. Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction.* * * *If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction.*"

See also *Angel v. Bullington*, page 7, ante.

The basic error made by appellees was that the petition for prohibition-mandamus did not present a case of attempted exercise of non-existent or excessive circuit court jurisdiction, but, on the contrary, patently attempted to arise a question of *merits of appellants' alleged cause of action*, i. e., appellants' interest in the matters complained of and the effect of such matters upon them and their properties and businesses; all of which was but *defensive* to the bill of complaint. In other words, a question of merits, not jurisdiction, was involved, and that question could not legally be presented to the Supreme Court of Michigan except through an appeal.

Appellants' litigable status could not, by any procedure, be determined adversely to them without deciding against the constitutional rights which they claimed.

Turning to appellees' explanation and argument of the second ground of their motion, they say that: (a) the court decided only a question of local law as to appellants' litigable status; (b) further consideration of the question was unnecessary because of prior decisions; (c) the Fourteenth Amendment gave appellants no right to a circuit court trial on the facts and, in any event, appellants had their day in court as fully as if the hearing in the Supreme Court was upon an appeal from a circuit court order granting appellees' motion to dismiss the bill of complaint for lack of subject matter and party jurisdiction, and (d), the provisions of the Michigan statute as to prohibition and mandamus apply equally to all litigants.

Item (a) has already been covered.

Item (b) is, indeed, a startling contention. In fine, appellees claim that the existence of prior supreme court decisions, among other parties and as to other ordinances, precluded circuit court jurisdiction concerning similar subject-matter and invested the Supreme Court of Michigan with prohibition power. Suffice to say that the interpretation and application of prior decisions is not a matter of jurisdiction. Far from being a bar to circuit court jurisdiction, the interpretation of prior decisions and their application to factual situations developed by evidence is the traditional, usual and recognized trial court function, to the discharge of which appellants were entitled under the equal protection and due process of laws provisions of the federal constitution. The Supreme Court of Michigan lacked jurisdiction to displace the circuit court.

Brief reference should be here made to the six prior decisions (R. 252-254) upon which the Supreme Court predicated its judgment of prohibition and upon which appellees rely.

Andrews v. City of South Haven (1915), 187 Mich. 294. Andrews sought to restrain the city from selling electrical fixtures, at approximately cost, in connection with the operations of the city light plant, in competition with Andrews' electrical fixture business. Demurrer to the injunction bill was sustained, not on the ground that he had no right to sue, but on the ground that

> "* * * It does not appear that the municipality in so doing is conducting the business by different methods or under other rules than those which are observed by and control private business corporations or private individuals in the operation of an electric plant. * * *
>
> "The bill does not show that complainant has sustained or will suffer any loss or damage as a taxpayer by reason of what is charged. * * * To entitle him to equitable relief as a taxpayer, present or prospective damages must be shown."

On appeal, the ruling was sustained.[8]

Two of the cases, *Menendez v. City of Detroit* (1953), 337 Mich. 476, and *Nichols v. State Administrative Board* (1954), 338 Mich. 617, merely determined that a general taxpayer, not affected by the proposed public activity or the revenue bond financing thereof, had no standing to enjoin same. The Supreme Court decision in the *Menendez case* was on appeal from a circuit court decree. The *Nichols case* was an original prohibition proceeding instituted in the Supreme Court against a public officer. No circuit court proceeding was involved.

Bowers v. City of Muskegon (1943), 305 Mich. 676 and *Cleveland v. City of Detroit* (1949), 324 Mich. 527, involved the use of public streets for parking purposes. In neither case was the right of the plaintiff to sue involved. Each

---

[8]The Andrews decision did not bar another plaintiff, in a later case, from obtaining relief against a city which, without any necessity therefor, attempted to engage in a coal business in competition with plaintiff. *Toebe v. City of Munising*, 282 Mich. 1.

case was tried on the merits in the circuit court. Review in the Supreme Court was by appeal.

In denying that the exaction of meter fees was a tax rather than the exercise of valid police power, the court in the *Bowers case* said:

> "In the case at bar, there has been no satisfactory showing that the expense of enforcing police regulations, under the meter system, will be disproportionate to the cost of such regulations. Until such showing is made, we must conclude that the ordinance is one for the regulation of traffic and not to raise revenue."

The *Cleveland case* held that the city's use of the subsurface of a city street for the parking of motor vehicles was within the purpose for which the street had been dedicated. No question was involved as to the maintenance or continued maintenance of on-street parking meters nor as to the amounts that could be collected thereby, or for the undersurface parking.

The only case which involved municipal off-street automobile parking was *Wayne Village President v. Wayne Village Clerk* (1949), 323 Mich. 592, an original Supreme Court mandamus proceeding between city officials and to which no competitor or other person was a party. In appellants' responses to the petition of appellees for prohibition herein (R. 211), appellants denied that the ordinance in the *Wayne case* was practically identical with the Detroit ordinances and that the Wayne ordinance was upheld against the same attack as made by appellants herein. Appellants further alleged:

> "that the factual situation in the *Wayne case* differs materially from that involved in respondents' case, and the decision therein was expressly limited to the facts in and circumstances of that case"

including the facts that the action was a "friendly" one between the village officials; that the facts therein were admitted and did not involve the contentions made by [ap-

pellants] in their bill of complaint which seeks a determination of questions vitally affecting their businesses, property and individual rights. Further differences in the two cases were laid before the Supreme Court on oral argument, and, in the subsequent application for rehearing in the prohibition proceedings, i. e., the meter collections in the *Wayne case* were not unreasonable, only a single city parking lot adjacent to street meters was involved, and the revenue bond financing was "closed," not "open-end" (R. 268).

Even if the facts or issues in one or all of the six cases had been the same as those in appellants' circuit court suit, there was no basis for the application of the principle of res judicata or of collateral estoppel, for the reasons that appellants were not parties to any of the prior cases,[9] and no bar to the exercise of the power of the Supreme Court of the United States to review a state court judgment denying a federal right can be predicated upon a state court adjudication thereof.

This was definitely decided in United States v. Pink, 315 US 203, 62 S Ct 552, 86 L ed 796, *in which it was admitted not only that the same questions were involved in a prior case but also that the state court decision therein governed the subsequent case.*

The *Pink case* was on certiorari to review a state court summary judgment in favor of respondent Pink dismissing a complaint filed by the United States to recover surplus funds of a foreign insurance company in Pink's hands as state superintendent of insurance. He opposed certiorari reversal, on the ground that in *Moscow Fire Insurance Co. v. Bank of New York & Trust Co., et al,* NYS 2d 653, affirmed 284 NY 555, in which the United States had intervened,

[9] Res judicata and collateral estoppel are aplicable only against parties to an action. *Partmar Corporation v. Paramount Pictures Theatres Corporation,* — US —, 98 L ed (Advance p. 1). Neither principle applies to strangers to former litigation.

the New York Court of Appeals had determined that certain relevant Russian decrees had no extraterritorial effect.

> "Respondent insists that the complaint in this action was identical in substance and sought the same relief as the petition of the United States in the *Moscow F. Ins. Co. Case*, and that his answer set up the same defenses as were successfully sustained against the United States by the defendants in that case. He also maintains that both parties agreed on the motion for summary judgment that the decision in the *Moscow F. Ins. Co Case* governed this cause, leaving no issues to be tried."

a view with which the Supreme Court of the United States agreed as to questions of local law. Nevertheless, the Court reversed the judgment, saying:

> "But it does not follow, as respondent urges, that the writ should be dismissed as improvidently granted. The Moscow F. Ins. Co. Case is not res judicata since respondent was not a party to that suit.
>
> "* * * The claim of the United States based on the Litvinov Assignment raises a federal question. * * * This Court will review or independently determine all questions on which a federal right is necessarily dependent."

Young v. Ragen, 337 US 235, 69 S Ct 1073, 93 L ed 1333:

> "But it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right."

Broderick v. Rosner, 294 US 629, 55 S Ct 589, 79 L ed 1100:

> "The power of the state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard therein is subject to the limitations imposed by the Federal Constitution."[11]

---

[10] Not only were appellants denied a trial of their circuit court case, but the Supreme Court of Michigan refused to decide the important question raised by appellants as to taxability of the city off-street parking garages.

Study of the six cases sustains the following conclusions:

The facts and issues therein involved differed materially from those in appellants' case, and the prior cases did not and could not determine the important questions raised by appellants and which were dependent upon or materially affected by the factual situations in which the instant statutes and ordinances operated or were intended to operate. None of the cases determined that there was a jurisdictional impediment to the exercise of circuit court jurisdiction nor a basis for investing the Supreme Court of Michigan with plenary prohibitory power. Not only do the prior cases establish no basis whatsoever for applying the bar of res judicata or of collateral estoppel, but no settled pattern of Michigan decisions as to the issues presented by appellants has emerged therefrom.

The differences in factual and legal situations between appellants' case and the prior cases pertain to the character of the litigants and their interest in and their relationship to the matters in controversy, the provisions of the challenged statutes and ordinances and the impact thereof upon the parties plaintiff, and the circumstances and conditions bearing upon the amount lawfully collectable by meters for on-street parking and upon the validity of a covenant to continue the same undiminished. In fact, no case in which a trial was had of the issues presented in appellants' bill of complaint has yet been before the Michigan Supreme Court or, for that matter, decided by a Michigan trial court, and in no other case has a litigant asserting like or similar rights or claims been denied the right to a trial thereof. There was no review of any of the six cases by the Supreme Court of the United States, nor have the important questions raised by appellants as to the

constitutionality of the statutes and ordinances here involved been decided by it.

Appellees misconceive the principle and the essence of equal protection and due process of law when they assert that appellants had the equivalent of a day in court because they would have had no greater hearing if the matter had been before the Supreme Court upon an appeal from a circuit court order sustaining a motion to dismiss the circuit court bill of complaint. In the first place, there is no reason to assume that the circuit court would not have denied the motion to dismiss the bill of complaint, heard the case and granted appellants the or some of the relief which they sought. Nor is the constitutional requirement of equal protection of the laws met by saying that appellants had as much of a hearing as anyone similarly barred from the circuit court would have had. The equal protection provision inhibits discriminatingly barring a litigant from access to the court. Appellees offer no gauge of standards to be applied in the prohibitory process, for which they contend, other than the unregulatable mental conclusion that a question of rights has been sufficiently litigated by others to justify a bar to further judicial consideration thereof. The untoward results of such a power are apparent. Fortunately, it has not been recognized as compatible with our system of administering justice.

Viewed from any angle, the judgment of the Supreme Court of Michigan upheld the statutes and ordinances in question against appellants' attack on the grounds of repugnancy to the Constitution of the United States, and did so by a procedure that denied appellants the equal protection and the due process of law guaranteed by that Constitution.

Appellants ask that the appellees' motion be denied.[11]

Respectfully submitted,

GEORGE E. BRAND,

GEORGE E. BRAND, Jr.,

Attorneys for Appellants.

Dated June 18, 1954.

[11] We fail to find that the "Rebuttal to Assignments of Errors" served by appellees is contemplated by any applicable rule.